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No. 91-1814

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RAYMOND COMER and
MARION CORN - - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS - - Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION FOR RESPONDENT

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IN THE

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RAYMOND COMER and
MARION CORN - - - - - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION FOR RESPONDENT

JURISDICTION

Petitioners assert jurisdiction pursuant to 28 U.S.C. §1257. Respondent denies that jurisdiction is properly laid in this Court for reasons cited further herein in Respondent's Brief.

CONSTITUTIONAL PROVISIONS ASSERTED

Petitioners assert the application of the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. For reasons cited hereinbelow, Respondent denies their applicability.

STATEMENT OF THE CASE AND FACTS

The parties to this action stipulated facts prior to the Petitioners' appeal to the Kentucky Court of Appeals (Appendix, pages 1a-4a). Further, the Respondent directs the Court to Appendix for review of the Court of Appeals Opinion, Reversing, pages 5a-11a which details a concise, unbiased account of the pertinent facts of this case.

The Statement of the Case as recited by the Petitioners in certain instances is misleading and is addressed in the following paragraphs.

The Petitioners indicate that they spent over 40 years building the businesses in question (Petitioners' Petition, pages 9, 10; hereafter, Petition and page number). It should be noted that the Petitioners never testified in these proceedings and there is nothing in the non-jury trial record to show that they devoted over 40 years building these businesses.

The Petitioners indicated that "each business was very successful" (Petition, page 10). There was no proof presented.

Scott Street is referred to as a "service road" and South Broadway is characterized as being less-than-a-hundred-foot-drive where the Petitioners' properties abut (Petition, page 10). It is true that the subject properties abut Scott Street. Nowhere in the record, however, is Scott Street designated as a "service road." The Stipulation of Facts speak to the contrary (Appendix, pages 1a-4a).

The street the public used to gain access to the parking facilities of these properties was Scott Street before the reconstruction. After construction, Scott Street is the same street one must use to gain access to the same parking facilities. The only difference is that one must enter from

the east side of Scott Street instead of the west side. The east side accesses South Limestone a major traffic thoroughfare in the area of the University of Kentucky.

Further, there is no testimony regarding "less-than-a-hundred-foot-drive on a service road called Scott Street." Again at page 11 of the Petitioners' Petition, quoting "Messrs. Corn and Comer have always called this a 'near impossibility' circuitous route." Where in the evidence did they say this? They never testified.

The Petitioners also make misleading statements concerning the use of the properties after construction and the value of them (Petition, page 12). At the non-jury trial, the Petitioners indicate they "proved . . . that these properties could no longer be used for their current business, or for any commercial use . . . leading to the trial court's ruling "that 'reasonable access' was not retained." (Petition, page 12). The only witness called by the Petitioners was a restaurant owner who stated basically two things. In testifying, he indicated the change of access would permit about ten percent of the public to find the businesses after construction. However, he concluded that was only *his opinion* (Appendix, page 19a), an opinion for which he exhibited no expertise. Secondly, in terms of access to these properties, he was basing his opinion on *loss of business* (Appendix, page 19a).

It is imperative to note that there was a bifurcated non-jury trial on the issue of reasonable access. The Petitioners once again mislead us in their Statement of the Case when they inject the jury trial part of the case and quote from same (Petition, pages 12,13), to influence this Court with regard to the issue of reasonable access. The testimony cited on page 13 of Petitioners' Petition is taken from the jury trial and not from the bifurcated non-jury

trial where the trial court decided the reasonable access issue. Two witnesses were called to testify at the non-jury trial (Appendix, pages 12a-13a). The Petitioners called a restaurant owner whose testimony was based clearly on *his opinion* of loss of business. The Respondent called an engineer to testify at the non-jury trial. Months later, in the other half of the bifurcated trial, a jury trial was held on value of the property due to the trial court's ruling on reasonable access. The Petitioners at the jury trial on value called one witness, an appraiser. He did not testify at the non-jury trial. The Respondent called one witness at the jury trial, an appraiser, who also did not testify at the non-jury trial. The inclusion in the Statement of Facts quoting from the jury trial on the issue of reasonable access in the non-jury proceedings is highly improper and misleading. If the Petitioners desired this testimony at the non-jury proceedings, then they had their day in court to provide same. They should not try to confuse this court by mixing the two separate proceedings.

Since the Respondent has directed the Court to the Appendix, pages 5a-11a, for review of the Kentucky Court of Appeals account, no further factual elaboration is necessary.

REASONS FOR DENYING THE WRIT

I

The Supreme Court Is Without Jurisdiction to Decide This Case.

The thrust of the Petitioners' argument and their claim of federal jurisdiction lies in their belief (unfounded) that they have been denied "just compensation" for taking of their property relating to the Fifth and Fourteenth Amendments to the United States Constitution. Despite

the Petitioners' attempts at federal jurisdiction on the said basis, the record in the instant case disputes their contentions, and further this court cannot decide this case for lack of jurisdiction.

Nowhere in the first, second or third appeals to the appellate courts of Kentucky was there a federal question mentioned or passed upon by the state courts (Appendix, pages 5a-11a, 35a-37a). It would have been appropriate for the Petitioners to insist on their federal question at the first appeal. There, the trial court dismissed the Petitioners' Complaint for failure to state a claim upon which relief could be granted. In their appeal, Petitioners claimed only that their Complaint was sufficient under existing Kentucky Case Law with only a passing reference to constitutional due process rights. The argument that they now raise would have been an important consideration for that first appeal, but it was not preserved in the trial court, or ruled on by the Court of Appeals of Kentucky. Petitioners were successful in that appeal. In the final two appeals, they continued to argue that the facts of their cases constituted a "taking" under existing Kentucky law. After losing their last appeal, even in their "Conclusion" on the Motion for Discretionary Review, the only use of the phrase "due process of law," was an attempt to convince the court that a failure to follow the existing Kentucky law would result in a denial of "due process." This is the first time that the Petitioners have insisted that *any* court should rule on this or any other federal question.

Further, there is a challenge to the appellate jurisdiction because the case below did not raise the question ". . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . ." 28 U.S.C. §1257.

Here, the state's construction project as it allegedly affected the properties of the Petitioners was totally within the boundaries of the State's own right of way. The Petitioners did not lose one inch of ground. It was not a "taking" under "Eminent Domain," but a management *of* its own property—*on* its own property. But, even if it were an "Eminent Domain" situation, no constitutional challenge, with notice to the Commonwealth's Attorney General, was presented below, as required by KRS 418.075, and Kentucky Civil Rules of Procedure, CR 24.03. Such a failure is not fatal to Petitioners' appeals under Kentucky Law. It is, however, one more indication that the Petitioners never thought of pursuing a ruling on a federal question *until now.*

When faced with this situation before, this Court said in *Webb* v. *Webb,* 451, U.S. 493, 495 (1981):

> "Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 USC §1257 [28 USCS §1257]. As applied to the circumstances of this case, that statute requires that in the state courts petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which she now seeks to have this Court enforce . . . Our examination of the record convinces us that petitioner failed properly to raise or preserve a claim under the Full Faith and Credit Clause of the Federal Constitution in the Georgia courts."

Continuing:

> "We note . . . that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. . . . This court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts . . .' " [citation omitted].

Id. at 495.

The Court ruled that it was without jurisdiction in the case. The same holds true here.

II

The Decision of the Kentucky Appellate Court That the Trial Court Erred as a Matter of Law in Finding a Compensable Denial of Reasonable Access Is Correct and Consistent With Similar Decisions.

In simple terms this action was filed by Petitioners against the Respondent whereby the Petitioners claim they were denied reasonable access to their properties after the Respondent constructed a railroad underpass on South Broadway in Lexington, Kentucky. The Petitioners each owned property at the intersection of South Broadway and Scott Street prior to construction in 1987. Before construction, the public had direct access from South Broadway to Scott Street in front of Petitioners' properties and from Upper and South Limestone to Scott Street in front of Petitioners' properties. After construction, the properties do not have direct access to South Broadway, but have the same access to Scott Street and the highway system before and after construction. To get from their properties to that part of South Broadway in front of same requires driving approximately nine tenths (9/10) of a mile over Scott Street and other adjacent streets. However, the public does not have to drive one inch further to get from Upper and South Limestone in the area of the University of Kentucky. Neither of these properties had any physical taking from any part of them (Appendix, pages 2a, 6a, 22a, 36a).

The trial court dismissed the Petitioners' original Complaint upon Respondent's Motion. The Petitioners availed

themselves of their right to appeal their decision to the Kentucky Court of Appeals alleging deprivation of a right of reasonable access to the highway system (South Broadway), which resulted in a taking without just compensation. The Court of Appeals (First Panel) vacated and remanded the case for the reason that the trial court did not hear evidence to determine the issue (Appendix, page 37a). Motion for Discretionary Review by the Respondent was denied. The Court of Appeals (Second Panel) made the following astute observation of the First Panel's opinion:

> ". . . This Court noted that, although it appeared from the order of the trial court that Judge Meade believed the property owners were not denied reasonable access, the court had failed to make any specific finding or cite any legal authority regarding the issue of reasonable access. This Court's earlier opinion did not mandate a judgement for Comer and Corn. . . ." (Appendix, pages 6a-7a)

On remand to the trial court, the evidentiary hearing was held. To attempt to prove denial of reasonable access, Petitioners introduced evidence of diversion of traffic, loss of business because only ten percent (10%) of the public knew the parties were still in business and knew how to get to their doors, that Scott Street dead-ended at South Broadway and that South Broadway traffic had to travel a circuitous route of an additional nine-tenths (9/10) of a mile (Appendix, pages 16a-19a, 23a). The Bench upon hearing the evidence, ruled there was loss of reasonable access to the properties. After a premature appeal was filed by Respondent and dismissed by the Court of Appeals, a jury trial followed and was held over the Respondent's objections on the issue of damage.

The Respondent, after the jury trial, appealed to the Kentucky Court of Appeals to review the trial court's rul-

ing on reasonable access and the issues pertaining to evidence presented to the jury and the verdict.

It is submitted that the Respondent believed that the evidence presented at the hearing (bifurcated non-jury trial) when considered with reference to the legal standards set forth by case law was lacking to support the conclusion that Petitioners had lost reasonable access.

A quick review of the trial court's comments and the reversing opinion of the Kentucky Court of Appeals (Second Panel) clearly shows that the trial judge erroneously believed he was *directed* by the Kentucky Court of Appeals (First Panel) to make a finding of loss of reasonable access to Petitioners' properties. This is the crux of the entire case. The trial court in making its ruling referred to the Court of Appeals (First Panel) and Respondent and commented (Appendix, page 25a):

> "Well, I happen to agree with your law, but the Court of Appeals does not . . . I have no alternative but to follow their ruling . . . ."

Prior to the jury trial, the trial court commented (Appendix, page 29a):

> "THE COURT: Well that's bad because it's the appellate court that directed me to have the trial."
>
> "THE COURT: So if they want to reverse themselves. They're not reversing me. I've already ruled, but they reverse me."

Again at the conclusion of the jury trial, the trial court said (Appendix, page 29a-30a):

> ". . . As I've said throughout this litigation, I am in disagreement with the ruling of the appellate court, but twice I have attempted to resolve the matter and twice the appellate court sent it back. I was harking back to the days of Frisch's Restaurant on Harrodsburg Road when they four-laned the highway. There were

> two problems in that case . . . second, whether or not lack of access or limited access to a highway was compensable. And the appellate court, at the time the highest court . . . said lack of access or limited access is not compensable . . . and I'm not aware of any case which has changed that law . . . ."

The Kentucky Court of Appeals (Second Panel) in its reversing opinion correctly observed:

> ". . . it appears that the trial judge misconstrued the directive from the first appeal of this case. The deficiency noted on that appeal was the absence of any finding or conclusion of law based on evidence that the remaining access to the Comer and Corn properties was either reasonable or unreasonable. This Court's decision was required by the rule enunciated in *Commonwealth, Department of Highways* v. *Adkins,* Ky., 396 SW2d 768 (1965) . . . ." (Appendix, page 7a)

The Court further said:

> ". . . This court expressed no opinion as to what the ultimate determination should be. It only required that the narrow issue of reasonable access be addressed." (Appendix, page 8a).

Plain and simple the trial judge misinterpreted the directive of the First Panel's Opinion of which the Second Panel resolved the confusion.

Further, the Kentucky Court of Appeals (Second Panel) thoroughly discussed in its reversing opinion (Appendix, pages 9a-10a) the cases as regards the instant case and distinguished those cases where there was a compensable loss. One of the cases relied upon by the Respondent, *DeRossette* v. *Jefferson County*, Ky., 156 S.W.2d 165 (1941) was stated by the Second Panel to be the "most similar" case to the instant case. The Court distinguished this case with other cases relied upon by the Petitioners by stating:

> ". . . Here we do not have a complete destruction of ingress and egress to and from the subject properties." (Appendix, page 9a).

As the Court further notes:

> ". . . if one is east of the properties, the Scott Street route is still the same." (Appendix, page 10a).

The Petitioners would have us believe in error that no traffic ever entered Scott Street from the east side of town. The trial court even noted correctly that much of Mr. Comer's business came from a "substantial number of patrons . . . University of Kentucky Students" (Appendix, page 26a). This would be from the east side of Scott Street.

The Petitioners say at page 24 in their Petition that "The Commonwealth (Respondent) did not even cite *DeRossette* in its original brief to the Second Panel . . . ." This is clearly inaccurate. The Respondent did cite *DeRossette* as reflected in its Brief to the Second Panel (Appendix, pages 31a-34a).

The Kentucky Court of Appeals (Second Panel) after reading briefs and hearing arguments of counsel noted:

> "The evidence adduced at the hearing on remand showed that Comer and Corn retained access to their properties via Scott Street . . . to get to their properties from that portion of South Broadway which adjoins their properties, one must drive approximately nine-tenths of a mile. It is well-settled law in Kentucky that reasonable restriction of access, rerouting of public highways, and circuity of travel caused thereby are not legally compensable. *Commonwealth, Department of Highways* v. *Diuguid,* Ky., 469 S.W.2d 707 (1971); *Commonwealth, Department of Highways* v. *Rosenblatt,* Ky., 416 S.W.2d 754 (1967) . . . ." (Appendix, page 8a)

Not satisfied with the Court of Appeals' Opinion reversing, the Petitioners sought review by the Supreme Court of Kentucky. Their Motion for Discretionary Review by the Supreme Court of Kentucky was denied without comment.

III

This Case Does Not Involve an Important Decision Directly in Conflict With the Decision of the United States Supreme Court in *First English Evangelical Church* v. *County of Los Angeles*, 482 U.S. 304 (1987).

Although the Respondent believes the record on its face thoroughly and completely negates the Petitioners' claims, the Respondent deems it appropriate to respond to the Petitioners' arguments and the cases cited. Petitioners rely heavily on *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987) to promote a taking. The Church operated a campground for handicapped children. The grounds contained twenty-one acres along a river bank. A flood in 1978 destroyed the grounds and buildings. A year later, the County of Los Angeles due to the flood adopted an ordinance prohibiting construction or reconstruction of any building along the river bank which included the campground site for the children. The Church and the County alleged the ordinance deprived the Church of all use of the campground. The Court here addressed the issue of whether the "Just Compensation Clause requires the government to pay for 'temporary' regulatory takings." *Id.* at 313. The Court held "that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." *Id.* at 322.

This Court went on to say, however:

> "We limit our holding to the facts presented . . . ." *Id.* at 321

First English is obviously a land use case that applies to a temporary regulatory taking. The Church was not permitted use of the property. In the instant case, the properties are still in tact. There are no restrictions of use. They can be used for any use the property owners desire within the laws of Lexington. The case at hand is a case of circuity of travel which is noncompensable. In *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. 166 (1872), also relied on by Petitioners, take note there had been a physical invasion of the real property of a private property owner and that he was practically ousted of possession. This distinguishes the instant case.

In a recent decision *Lockary* v. *Kayfetz*, 917 F.2d 1150 (9th Cir. 1990), the United States Court of Appeals discussed a case considering *First English* which also was a case alleging a regulatory taking of land. While we do not concede that either of these two cases is the instant case, the Court's discussion sheds light on the Petitioners' arguments. In *Lockary*, the Bolinas Community Public Utility District and its directors (hereinafter "BCPUD") denied water hookups to appellant partnership and its general partner who owned undeveloped land. Upon filing of suit, summary judgment was granted to appellee. The United States Court of Appeals reversed the grant of the summary judgment to allow Appellant "to establish whether BCPUD's rejection of the water hookups arbitrarily denies them all economically viable use of their land." *Id* at 1157. In application here, the Petitioners had every opportunity to present *whatever evidence* they so desired at the non-jury trial as to loss of reasonable access including how the

construction affected the "economically viable use" of their properties. They quote from *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) regarding their "reasonable investment backed expectations." *Id.* at 175. However, at the non-jury trial, they missed any opportunity they had to present facts in support of each and every argument they now make. What evidence did they present to advance their position? They presented one witness, who had over twenty years experience in the restaurant business. He advanced his *non-expert opinion* on Petitioners' access and that his opinion was based on *loss of business.* (Appendix, page 19a). There were no studies or surveys taken (Appendix, page 19a). Did any witness testify to "reasonable investment backed expectations" or how there was a loss of reasonable access based on evidence other than circuity of travel or diversion of traffic? The record is completely devoid of any evidence to support Petitioners' claims. Had evidence been presented as the Kentucky Court of Appeals indicated, the Petitioners might have had a valid claim. Even if evidence were presented, a mere reduction in the properties' value does not establish that all economically viable use of the property is denied. *Trustee for Alaska* v. *E.P.A.*, 749 F.2d 549, 560 (9th Cir. 1984).

The Petitioners cite other state courts in deciding loss of access since *First English* such as *Palm Beach County* v. *Tessler*, 538 So.2d 846 (Fla. 1989). Here, the case turns on Florida law that recognizes right of access as a property right which every adjoining landowner holds to every point of access. The Opinion recognizes some states do not consider each access as a property right. Instead, they consider the total access picture to determine reasonable access. Kentucky is one of these states. Further, *Tessler* did not get an unlimited following in its own state. Take, for

example, *State, DOT* v. *Weggies Banana Boat,* 576 So.2d 722 (Fla. App. 2 Dist. 1990) which considered *Tessler,* but chose not to follow.

In *Weggies,* there was even a physical taking and the road modification "resulted in a 23 foot wall and roadway" affecting the "visual and physical accessibility of motorists passing its premises." *Id.* at 724. In quoting from *Tessler,* the Court said "The loss of the most convenient access is not compensable where other suitable access continues to exist." See also, *Division of Admin.* v. *Ness Trailer Park, Inc.,* 489 So.2d 1172 (Fla. App. 4 Dist. 1986) reflecting Florida recognizes that circuity of travel is not compensable.

The case of *Merritt* v. *State,* 742 P.2d 397 (Idaho 1987) cited by Petitioners clearly shows access closed at one end, allowing the property access from the other end." *Id.* at 400. Compared with the instant case, Scott Street closed on one end, and it has access from the east side. A case in point. The problem with the Petitioners' view is that they forget they have the same preconstruction access where Scott Street east intersects with Upper and Limestone at the University of Kentucky. As the Court in *Merritt* said at 400:

> ". . . the requirement of merely a more circuitous route to reach property is merely a by-product of a regulation, and does not constitute a taking." [citation omitted]

Three D Corporation v. *Salt Lake City,* 752 P.2d 1321 (Utah App. 1988), cited by Petitioners was a loss of parking case. Even if the facts in *Three D* justify the result, the facts in the instant case are distinguishable.

Com'r. of Transp. v. *Nat. Amusements,* 581 A.2d 1353 (N.J. Super. A.D. 1990) in citing a Kentucky case, *Commonwealth, Dept. of Highways* v. *Denny,* 385 S.W.2d 776 (Ky. 1964) does not change anything because the Petitioners

still have reasonable access to the highway system via Scott Street east.

What we have learned since *First English* is that there is not a clear view as to what constitutes a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution. As Judge Bakes said in his Opinion concurring on rehearing in *Merritt,* in discussing this Court's position at 406:

> ". . . *Keystone Bituminous Coal Ass'n* v. *DeBennedictis, supra* at 1247 (' " 'this court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." ' ") . . ."

Therefore, one must look then to the presented facts and circumstances of each case.

Recently in a physical taking case, *Grapevine* v. *Grapevine Pool Rd. J. Venture,* 804 S.W.2d 675 (Tex. App.—Fort Worth 1991), where one road was cut off—restricting access, the Court said at page 678:

> "One of two public streets may be closed without compensation to abutting landowners if the remaining street furnishes a suitable means of access to the piece of property." [citations omitted]

As *Grapevine* indicates, no compensation is paid to abutting landowners if there is a suitable means of access. How do we arrive at the question? By looking at the evidence presented. In the instant case, the Petitioners had the burden to show the loss of reasonable access. They produced one witness (bifurcated non-jury trial) whose opinion was incompetent to show a "taking" or unreasonable access. There may have been more evidence as the Second

Panel suggests, but the Petitioners did not go farther to meet this burden of proof. They now ask this Court to straighten out their failure to meet same.

Earlier cases support the Kentucky Courts in its view such as *Triangle, Inc.* v. *State,* Alaska, 632 P.2d 965 (1981) again where some property was physically taken and one had to travel about one-half (1/2) mile of a circuitous route to reach a nightclub after construction. Quoting from *B & G Meats, Inc.* v. *State,* Alaska 601 P.2d 252, (1979), the Alaska Court said at page 967:

> " ' . . . circuity of travel, so long as it is not unreasonable, is non-compensable. Likewise, loss of business occasioned by the diversion of traffic is noncompensable.' "

As the Court further stated in *Triangle:*

> ". . . its only right was to reasonable access . . . ." *Id.* at 967.

In *B & G Meats,* a frontage road was made a one-lane road causing some of its patrons to travel an additional 2.3 miles to reach the meat store. The Alaska Court said it was not so unreasonable to constitute a compensable taking, the same as it held in *Triangle.* See also, *Ray* v. *State Highway Comm.,* Kan., 410 P.2d 278 (1966); *Stipe* v. *United States,* 337 F.2d 818 (10th Cir. 1964); *Houghs* v. *Mackie,* Mich., 137 N.W.2d 298 (1965); and *State Highway Com'n.* v. *Scrivner,* Wyo., 641 P.2d 735 (1982). In *Scrivner,* there was property physically taken. The case, *Fla. East Coast Prop.* v. *Metropolitan Dade Cty.,* 572 F.2d 1108 (Fifth Cir. 1978) in discussing a diminution in value to present a valid claim for compensation under the Fifth or Fourteenth Amendments quoted the Kentucky Court of Appeals in *Louisville and Jefferson County Air Bd.* v. *Porter,* Ky., 397 S.W.2d 146 at 152 (1965) where it said:

> ". . . It is fundamental that a buyer of property assumes the risk of changing community conditions. Sometimes the value of his property is enhanced, and he does not have to pay for the enhancement. Sometimes it declines, and he has no recourse. These facts of life are not subject to an exception simply because the source of the transition can be identified and is suable . . . ."

This is the Kentucky view.

As the Tennessee Court said in *City of Memphis* v. *Hood*, Tenn., 345 S.W.2d 887 (1961) at 890:

> ". . . In the instant case the damages claimed are those as a result of the lawful authorities acting in changing the traffic and such damages are noncompensable to anyone, because if we allowed damages in this way to everyone who might claim that . . . traffic as diverted caused this and that damage to them it would completely obstruct the building of roads and highways by the public authorities . . . ."

Where would Kentucky be if every time it built a bypass all downtown business owners could claim damages? That is a reasonable extension of this case. It would not only disrupt and obstruct the building of roads, but it would eventually bankrupt the coffers of the Commonwealth.

And finally, in a case cited by Petitioners' *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673 (1930) at 680:

> ". . . the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State . . ."

The Kentucky Court of Appeals has reviewed the limited facts presented by the Petitioners at the bifurcated non-jury trial. They weighed them in the balance and found them wanting. The Supreme Court of Kentucky

denied discretionary review. The Petitioners' Claims are not valid.

IV

The Law of the Case Was Not Decided by the First Panel of the Kentucky Court of Appeals.

The Petitioners attack the Second Panel of the Kentucky Court of Appeals in that they (Petitioners) claim the Second Panel did not reaffirm the law pronounced by the First Panel. This is where the Petitioners have focused and continue to make a glaring error. The First Panel *only* vacated and remanded the case to the trial court for the reason the trial court did not hold a hearing for the presentation of evidence. The First Panel *did not affirm law* on the taking issue as Petitioners suggest. It remanded for a hearing. The trial court misinterpreted the First Panel's directive as the First Panel *did not* express an opinion as to what the final determination should be. It only told the trial court to hold a hearing and decide the issue of reasonable access. Nothing more, nothing less. The trial court proceeded, but erroneously believed it was directed to rule that there was unreasonable access. The idea of the First Panel deciding the law of the case is moot. ". . . It is not applicable here because when this case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in feri* . . . ." *United States* v. *U.S. Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950).

CONCLUSION

The Respondent submits that the record clearly reflects that no federal question was mentioned or passed upon by the state courts and this Court is without jurisdiction to decide this case. Even if it had jurisdiction, the Petition-

ers have not shown any reason that this Court should review the decision of the Court of Appeals below. Accordingly, the Respondent would respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted.

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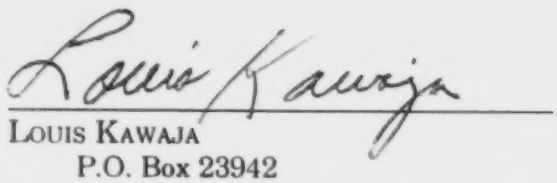
CERTIFICATE OF SERVICE

This is to certify that copies of the Brief for Respondent in Opposition have been served by mailing three true copies thereof to Hon. Robert S. Miller, Miller, Griffin & Marks, PSC, 700 Security Trust Building, 271 West Short Street, Lexington, Kentucky 40507, Telephone No. (606) 255-6676, and to Hon. John C. Scott, Clerk, Supreme Court of Kentucky, New Capitol Building, Frankfort, Kentucky 40601, Telephone No. (502) 564-4720 on this the 6th day of June, 1992.



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APPENDIX

No. 87-CI-4114

FAYETTE CIRCUIT COURT

CIVIL BRANCH
SECOND DIVISION

RAYMOND COMER and
MARION CORN - - - - - - - - - *Plaintiffs*

v.

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS - - - - - *Defendant*

STIPULATION OF FACTS

The Plaintiffs and the Defendant being in agreement, the parties hereto stipulate the following facts:

1. Raymond Comer ("Comer") is the owner of certain real property located at and known as 684-686 South Broadway, Lexington, Kentucky and more particularly described on Exhibit "A" attached hereto and incorporated herein.

2. Marion Corn ("Corn") is the owner of certain real property located at and known as 704 South Broadway, Lexington, Kentucky and more particularly described on Exhibit "B" attached hereto and incorporated herein. "Bowyer Street" referred to on Exhibit "B" is believed to be what is now called "Scott Street". There is no street presently existing in the area called "Bowyer Street."

3. During 1987, Defendant altered the location of or removed that portion of South Broadway adjacent to and

in the area of the real properties owned by Plaintiffs by its construction of a railroad underpass in that vicinity.

4. South Broadway is a part of the public highway system and Plaintiffs are entitled to a right of reasonable access to the highway system.

5. Prior to the construction of the underpass, Plaintiffs' properties fronted on South Broadway. After the construction of the underpass, Plaintiffs' properties do not have vehicular access to South Broadway, but have vehicular access to Scott Street.

6. Plaintiffs' properties are presently used and were used prior to the construction of the underpass for business and commercial purposes, including such purposes as a hotel, lounge, and restaurant.

7. Plaintiffs' experts would testify that the fair market value of Plaintiffs' properties on South Broadway has declined due to Defendant's construction of the underpass.

8. No property owned by Plaintiffs was condemned by Defendant to enable the construction of the underpass.

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By: /s/ Louis Kawaja
Louis Kawaja
Attorney for Defendant

EXHIBIT "A"

Beginning at a point in the east property line of South Broadway, said point being 99.5 feet north of the north property line of Scott Street as measured along the east property line of South Broadway, said point being in the division line between Louise Kirk Headley and Raymond Comer; thence with Headley and Comer for two lines between the existing buildings, in an easterly direction 111 feet and in a southerly direction 114.8 feet to a point in the north property line of Scott Street, said point being 97.2 feet east of east property line of South Broadway as measured along said north property line of Scott Street.

EXHIBIT "B"

All that tract of land with improvements thereon known as 704 South Broadway in the City of Lexington, County of Fayette and State of Kentucky, described as follows:

All that lot of land on the East side of Broadway, between Bowyer Street and the Cincinnati Southern Railroad property, bounded as follows: Beginning on the East side of Broadway in said City of Lexington, Kentucky, at the corner of Bowyer Street; thence along Broadway in a Southerly direction a distance of forty six and three tenths (46.3) feet to the property of the Cincinnati Southern Railroad; thence along the Southern Railroad property line in a Southeasterly direction a distance of one hundred and thirty eight and seven tenths (138.7) feet to the property now or formerly owned by Wheeler; thence with Wheeler's line in a northeasterly direction a distance of eighty five and seven tenths (85.7) feet to Bowyer Street; thence along Bowyer Street in a Westerly direction a distance of one hundred and thirty (130) feet to Broadway at the place of beginning.

No. 91-CA-137-MR

RENDERED: DECEMBER 20, 1991; 10:00 A.M.
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS - - - - - - *Appellant*

v.

RAYMOND COMER and
MARION CORN - - - - - - - - - - *Appellees*

Appeal From Fayette Circuit Court
Honorable N. Mitchell Meade, Judge
Action No. 87-CI-4114

REVERSING

BEFORE: HOWERTON, SCHRODER, and WILHOIT, Judges.

HOWERTON, JUDGE. The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways appeals from a determination of the Fayette Circuit Court that Raymond Comer and Marion Corn were denied reasonable access to their properties when the state constructed a railroad underpass on South Broadway in Lexington. After the trial court concluded there was a public taking of the land, a jury awarded $240,000 to Comer and $111,000 to Corn.

In a previous proceeding, the trial court concluded that there was no compensable taking. As that decision was apparently based on the judge's personal knowledge of the situation, this Court reversed the judgment and remanded for a trial and findings. Judge Meade committed a procedural error in the first proceeding, but he apparently had a correct understanding of the substantive issue. On remand, he heard the evidence and made his findings, but on the ultimate question of a compensable denial of reasonable access, he erred as a matter of law. We reverse.

Comer and Corn each owned property at the intersection of South Broadway and Scott Street in Lexington prior to construction of the railroad underpass in 1987. Before construction, the public had access directly from South Broadway to Scott Street in front of the properties, on which each was operating a business. After construction of the underpass, the properties did not have direct vehicular access to South Broadway but continued to have direct access only to Scott Street. It is now necessary to drive approximately nine-tenths of a mile over Scott Street and other adjacent streets to get to these properties from Broadway. There was no physical taking of any part of either the Comer or Corn property.

Comer and Corn filed the first appeal to this Court after the trial court dismissed their original complaint, which alleged deprivation of a right of reasonable access to the highway system, resulting in an unauthorized taking without just compensation. This Court vacated and remanded the case, holding that the trial court must hear some evidence in order to determine the issue. This Court noted that, although it appeared from the order of the trial court that Judge Meade believed the property owners were not denied reasonable access, the court had failed to make any specific finding or cite any legal authority regarding the issue of reasonable access. This Court's earlier opinion

did not mandate a judgment for Comer and Corn. After this Court's decision, the Commonwealth's motion for discretionary review was denied.

On remand, the trial court held an evidentiary hearing. Comer and Corn introduced evidence of circuity of travel and diversion of traffic, as well as evidence from which loss of business could be inferred. After all the evidence was presented, the trial court ruled that the property owners had lost reasonable access. A jury trial to determine damages was held over the Commonwealth's objection. The jury awarded Comer $240,000 and Corn was awarded $111,000. The Commonwealth now appeals to this Court to review the trial court's decision regarding reasonable access, along with the issues regarding the evidence presented to the jury and its verdict.

The Commonwealth argues that the evidence presented at the hearing, when considered in light of the legal standards enunciated in the case law, was insufficient to support the conclusion that Comer and Corn had lost reasonable access to their properties. We believe this argument is sound.

Initially, it appears that the trial judge misconstrued the directive from the first appeal of this case. The deficiency noted on that appeal was the absence of any finding or conclusion of law based on evidence that the remaining access to the Comer and Corn properties was either reasonable or unreasonable. This Court's decision was required by the rule enunciated in *Commonwealth, Department of Highways* v. *Adkins,* Ky., 396 S.W.2d 768 (1965). Ordinarily, whether the landowner has been deprived of reasonable access is a question of law which should be resolved by the court, but in order for it to be resolved at all, the facts must be disclosed.

No evidentiary hearing was held, although a stipulation was filed. The landowners were denied the right to

demonstrate by evidence, if they could, that Scott Street does not meet modern vehicular requirements, or that it was impassable at certain times, or that it provided insufficient driveway space for commercial vehicles, or that it in some way other than circuity was not reasonable access. This Court expressed no opinion as to what that ultimate determination should be. It only required that the narrow issue of reasonable access be addressed.

The evidence adduced at the hearing on remand showed that Comer and Corn retained access to their properties via Scott Street; however, in order to get to their properties from that portion of South Broadway which adjoins their properties, one must drive approximately nine-tenths of a mile. It is well-settled law in Kentucky that reasonable restriction of access, rerouting of public highways, and circuity of travel caused thereby are not legally compensable. *Commonwealth, Department of Highways* v. *Diuguid,* Ky., 469 S.W.2d 707 (1971); *Commonwealth, Department of Highways* v. *Rosenblatt,* Ky., 416 S.W.2d 754 (1967). Clearly, governments must have the authority to grant or deny parking on the streets, establish one-way traffic, allow or deny curb-cuts and driveways, erect dividers and safety barriers in streets, and other such things to improve traffic flow and safety.

DeRossette v. *Jefferson County,* 288 Ky. 407, 156 S.W.2d 165 (1941), the case most similar to the case at bar, involved a property owner's claim that an underpass built by the county destroyed his property without payment of just compensation. The owner alleged that the road alteration interfered with traffic moving along a heavily-travelled road on which he was conducting a profitable business. The underpass construction rerouted or diverted traffic to the new highway. This led to loss of business and depreciation in the value of his real property.

The *DeRossette* court thoroughly examined the case law and distinguished the cases where a compensable loss was found. Unreasonable obstruction in which *all* means of ingress were destroyed was a common theme found in several of the cases where compensation was awarded. This was the situation in *Henderson* v. *City of Lexington*, 132 Ky. 390, 111 S.W. 318 (1908), and *Illinois Central Railroad Company* v. *Ward*, 237 Ky. 478, 35 S.W.2d 863 (1931). The *DeRossette* court further noted that other cases with compensable damage existed when there was unreasonable interference with ingress and egress or there was a wrongful or illegal obstruction of a public road. The court found *Cranley* v. *Boyd County*, 266 Ky. 569, 99 S.W.2d 737 (1936), to be an example of unreasonable interference when a county engineer closed access to an old road used by the plaintiff when the barriers effectively destroyed her ingress and egress to that road. The *Cranley* court limited its holding to the facts and specifically stated that "[no] compensation [will] be required where a change in a road results merely in personal inconvenience or injury, such as to trade or business by diverting traffic, or compels a more circuitous route of access." 266 Ky. at 573.

Although Comer and Corn rely on *Henderson, supra,* and *Ward, supra,* these cases are easily distinguishable from the present case. Here, we do not have a complete destruction of ingress and egress to and from the subject properties. Neither do we have an unreasonable obstruction as presented in *Cranley.* Also, we note that the remainder of the cases cited by Comer and Corn involve a *physical taking* from the abutting properties and are thus distinguishable.

DeRossette, supra, and the cases discussed therein, indicate that where there is only a diversion of traffic or a circuitous route of travel suffered by the property owner, there is to be no compensation. In the case before us, it is evident that the public has to take another route from

South Broadway to the Comer and Corn properties. But, as the Commonwealth points out in its brief, if one is east of the properties, the Scott Street route is still the same.

The DeRossette case was cited with approval in *Department of Highways* v. *Jackson*, Ky., 302 S.W.2d 373 (1957), which was an action by an owner for depreciation of land value when a county road between his property and a nearby town was closed. The court held that the closing of the county road at one end did not deprive the owner of reasonable access from his land to the highway system and that he was therefore not entitled to damages, even though the closing required taking a slightly longer route to the nearby town. The court noted that past decisions has made a distinction between county highways and city streets as to the rights of abutting landowners to continued maintenance. The rule had been that a landowner along a county road had no property right in the continued maintenance of that road, while a landowner along a city street had a right, in the nature of a private easement, to the continued maintenance of platted or dedicated streets. 302 S.W.2d at 374. In specifically holding that this distinction be abolished, the court declared "that the rule governing city streets shall be the same as that herein stated for county roads." *Id.* at 376. *Jackson* overruled all earlier cases in conflict with this new rule, including, to this extent, *Cranley, supra,* and *Ward, supra.*

In conclusion, we recognize the difficulties frequently presented by inverse condemnation cases, and the resulting hardships often experienced by the parties involved. However, it is not for this Court to carve out any exceptions to the general rule of law applicable to cases such as this. The inherent nature of the circumstances involved in such cases has required that rules be created, which may sometimes be viewed as arbitrary, but which in fact provide workable, objective standards. Neighborhoods, traffic pat-

terns, safety requirements, and the like change over time, and governments must not always be required to compensate a property owner for every inconvenience or loss of business. The facts here present a case of noncompensable damage. The trial judge gathered the evidence as required but then reached the wrong conclusion of law. Because we find that there is no support in the case law to hold that Comer and Corn were denied reasonable access to their properties as a result of the construction of the underpass, we decline to address the remaining issues raised by the Commonwealth.

The judgment of the Fayette Circuit Court is reversed.

ALL CONCUR.

Attorney for Appellant:
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Attorneys for Appellees:
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ROBERT S. MILLER
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Lexington, KY

No. 87CI4114

FAYETTE CIRCUIT COURT

CIVIL BRANCH
SECOND DIVISION

RAYMOND COMER and
MARION CORN - - - - - - - - - *Plaintiffs*

v.

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS - - - - - *Defendant*

TRANSCRIPT OF THE EVIDENCE AND PROCEEDINGS OF THE NON-JURY TRIAL HEARD ON JANUARY 31, 1990

Juanita Stollings
Official Court Reporter
401 Courthouse
Lexington, Kentucky 40507
606 233-0817

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Evidence In Behalf Of Plaintiffs:

The first witness, GIOVANNI FREDA, after first being duly sworn, testified as follows:

The Court: State your name and your occupation.

Witness: Pardon me?

The Court: Name, address and occupation.

Witness: My name is Giovanni Freda.

The Court: Spell your last name.

Witness: F-r-e-d-a. I live on 505 Shaftsbury Road, Lexington. My occupation, I've been in the restaurant business and property owner, and at the present time I'm retiring.

Direct Examination By Mr. Miller:

Q. Mr. Freda, how long have you been in the real estate business?

A. Since 1967.

Q. Will you tell briefly for the Court some of the properties that you've owned, bought and sold in the area of South Broadway that Mr. Comer's —

A. Well, no properties on South Broadway, but around Limestone and Maxwell Street very close to South Broadway, yes.

Q. Would you tell the Court —

A. I own the property on 270, 290, 276, 266, which is the Dunn Building, used to be the restaurant, the Executive

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House Restaurant used to be there, which is 1880 right now. Most of that block I own that plus the parking lot across the street where Joe Bologna parking lot was.

I own property on Warren Court. Own property on Bassett Court and on Henton Road, all in Lexington.

Q. Mr. Freda, how long have you been in the restaurant business?

A. Since 1969.

Q. And would you tell the Court some of the restaurants throughout this area that you've been involved with?

A. I own the Mama Mia Pizzeria, Giovonni's Pizza. I owned the Executive House Restaurant. I used to own the Cave Restaurant, built it and operate it in Frankfort, Kentucky.

The Court: The what?

Witness: Pardon me?

The Court: What was that in Frankfort?

Witness: The Cave. The Cave Restaurant. I build it and operate it. And I was involved with the Holiday Inn. I was the general manager of the Holiday Inn. I was here work at the Holiday Inn West and then I was manager at the, general manager at the Holiday Inn in Morehead, Kentucky.

Q. So you're familiar with the hotel business as well

as the restaurant and real estate business?

A. Yes. Plus I've been in the area. I attend the University of Kentucky since 1963. So I've been in the area.

Q. Are you familiar with the properties owned by Mr. Corn and Mr. Comer on Scott Street in Lexington and have you been familiar with those for a long period of time?

A. Since I was a student over U.K., yes.

Q. And are you familiar with the access that each had to South Broadway both before and after the overpass was built?

A. Yes.

Q. Would you describe to the Court the access before and after and give your characterization and how you would describe that to the Court?

A. Well, for years when most every time I went to Mr. Comer's restaurant, I always went to Broadway, and very seldom we use the Scott Street because it's not too many people is familiar with that street.

Mr. Kawaja: I object to that. I don't think he knows how many people are familiar with it.

The Court: Overruled.

Q. You may go ahead, Mr. Freda.

A. So I always use the Broadway exit and entrance,

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and since this has been blocked, I used to go to see Mr. Comers even on this parking lot quite often, and since it's been blocked, usually I get on Broadway and sometimes the traffic is so bad in the area there, Bolivar Street, that I just keep going. I never stop. In a year, I've been maybe two or three times to see him.

Q. Based on the experience you've described in the real estate business and the restaurant business and the hotel business, how would you characterize the use of such access by the general public?

A. Right at the present time if that restaurant and bar were to be given to me just with the free rent, I wouldn't operate it because you can't make the expenses for the utilities.

Q. Would you describe to the Court why that is?

A. Well, it's no access to it. It's just people has been used to years—I know that restaurant has been there I know for over thirty or twenty-seven some years, but I know people know Comer's. Almost everybody in town knows Comer's. But I don't think they realize that, you know, he's still there because of the access.

Q. What percentage of the people in this community, based on your experience, would know how to get to those restaurants now?

Mr. Kawaja: Objection, Your Honor.

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A. I believe a very small percentage.

The Court: Overruled.

Q. Based on your experience, can you estimate a percentage?

A. Maybe a ten percent.

Q. Can you tell the Court, based again on the experience that you've described, the importance to businesses such as these of access to the highways?

A. Especially the type of business, my experience in the restaurant and bar business, you got to have plenty access, easy access for public to come in and out because people they don't travel a mile to go all the way around to try to find where the place is. Especially the particular business where he was there for years and that's the only way they knew how to get in, a lot of people, from the Broadway side.

Mr. Miller: That's all, Your Honor.

Cross-Examination By Mr. Kawaja:

Q. Mr. Freda, how did you get to the parking area for either of these two establishments when you entered from Broadway? What street did you come upon?

A. What street?

Q. Yes.

A. On Broadway.

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Q. You said you used Broadway.

A. Yes.

Q. To get to these properties and park, where did you park?

A. Well, Mr. Raymond Comers has a park in there.

Q. Where is the parking?

A. Right on Scott Street.

Q. It's on Scott.

A. Yes.

Q. So you came off of Broadway to Scott Street, correct?

A. Yes.

Q. That's how you got to the establishments?

A. Yes.

Q. Did you park in front on Broadway anywhere?

A. No. I never parked in the front, no.

Q. Could you park on Broadway before the construction?

A. I don't really know. I don't think so.

Q. You said you were familiar with it.

A. Well, but I never, you know, pay attention to park there because he always had enough parking on Scott Street, which he had parking right with the building plus across the street right on Scott Street. So I never, you know, park on the street.

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Q. But you don't know then whether you could park on Broadway or not?

A. No, I don't. I'm not familiar if somebody had parked there.

Q. You mentioned a figure that Mr. Miller asked you about, ten percent of the public, you know. That would be the percentage that would know maybe how to get there. How did you make that determination?

A. Because I've been in the restaurant business many years and I talked to a lot of people that—usually the

same kind of people goes out that goes to a lot of restaurants and bars, and I know people that they don't know that Raymond Comer is still exist in there, that building or when he had it for business last two or three years.

Q. But did you do any kind of survey or study or is this just your opinion?

A. That's just my opinion.

Q. All right. And are you basing your thought as to this piece of property, in terms of access and so on, as to loss of business?

A. Yes, sir.

Mr. Kawaja: That's all.

Mr. Miller: That's all, Your Honor. We rely

on Mr. Freda and the material matters that are in the record.

Mr. Kawaja: We call Mr. Dennis Bellamy to the stand.

Evidence In Behalf Of Defendant:

The first witness, DENNIS BELLAMY, after first being duly sworn, testified as follows:

The Court: State your name, address and occupation.

Witness: My name is Dennis Bellamy. I'm a design engineer for the Department of Highways, Lexington, Kentucky.

The Court: What is your last name? How do you spell it?

Witness: B-e-l-l-a-m-y.

The Court: You're with the Department of Highways?

Witness: Yes, sir.

Direct Examination By Mr. Kawaja:

Q. Mr. Bellamy, how long have you been employed by the Department?

A. Thirty years.

Q. And you're a registered engineer?

A. Yes, sir.

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Q. Are you familiar now with the property known as Comer's and/or Boots Bar located on Scott Street and fronting what was old South Broadway now is Broadway?

A. Yes, sir.

Q. Mr. Bellamy, how long would you say you've been familiar with this piece of property or that location rather?

A. Twenty-five to thirty years roughly.

Q. Were you involved in some of the project known as the Broadway underpass or the railroad underpass?

A. Yes, sir. As a district design engineer in Lexington, I was involved in all phases in some way or another generally.

Q. Now, we've already stipulated these aerial photographs, and the one that is in black and white I believe you have labeled as "before construction," and the one that's in color, which is a bluish type color, is labeled "after construction of the Broadway railroad underpass;" is that correct?

A. Correct.

Q. And the parties, as I say, have stipulated to this. Now, by using the Exhibit No. 1, which is labeled No. 1, the black and white one, would you tell the Court exactly the routes that you're familiar with, the routes to this property prior to the construction of the railroad

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underpass? And if you need to get up, just get up and come up and point it out to the court.

A. Mr. Comer lies in the north—want me to describe where it is roughly?

Q. Yes. Go right ahead.

A. Mr. Comer's property lies in the northeast quadrant of Scott and Broadway. He fronts on Broadway. His parking lot is east of that, and to get—let me describe the Boots Bar also. It also fronts on Broadway. There's no access to Broadway to either of the properties. The parking lot is a little farther east of it also. It's in the south quadrant of Scott and Broadway.

Access to either of these properties before from Broadway, you could go north or south on Broadway and you could turn east on Scott Street for a little distance and then you could park at either one of 'em.

Also, if you wish, if you lived up north, you could approach 'em by Bolivar Street down through the warehouse area to Upper and you could go south on Upper Street to Scott and you could go west on Scott Street to the same point. Or if you was coming from south, you could approach by Broadway, as I mentioned, or you could go down in this area. East of Broadway, you could come Virginia Avenue to Limestone. You could come up Limestone to Scott and you could go out Scott to the properties.

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Q. And that is your description of how you got there before the construction?

A. Yes, sir.

Q. Okay. And the arteries that you have pointed out to the court, are those the main arteries that you're familiar with?

A. Yes, sir.

Q. Now, if you need to, we might put this upon the—

The Court: Can't we summarize the second one by simply saying that there is no access from Broadway, but

other avenues, already described, are still there.

A. Yes, sir.

Mr. Kawaja: And we want to use this exhibit.

The Court: I've already summarized what he would say.

Mr. Kawaja: Okay. As far as you're concerned then, Your Honor, you're satisfied with that.

The Court: Oh, yes. We've now reached the conclusion that there's no access from Broadway but all other access is still the same.

Mr. Kawaja: It's still the same.

Essentially that's the case, Your Honor.

Q. And if I may ask him a few more questions just for

the record, there are no disturbances along Limestone or what is know as Nicholasville as to access with regard to this construction of any manner; is that correct?

A. That's correct.

Q. Scott Street as to access?

A. Scott Street remains the same except that you cannot access Scott from Broadway.

Q. What about the parking for the Comer's and the other restaurant there?

A. The parking remains the same. It has not been affected.

Q. Was any property actually physically taken from these two properties?

A. No, sir.

Mr. Kawaja: That's all I have, Your Honor.

Cross-Examination By Mr. Miller:

Q. Mr. Bellamy, the shortest route that you've described is one of the alternates that existed before and

remains now, the one down Bolivar. Have you measured the distance of that?

A. From what point? Do you mean from Broadway?

Q. Well, from Comer's to Comer's. From Broadway as it passes Comer's and Corn to get actually to the parking lot.

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A. You mean from Bolivar right up here to get to it now? Is that what you mean?

Q. No, sir. I mean the circle from the prior entrance down Bolivar—down South Broadway, down Bolivar, down Upper, to Scott.

A. To get to it from this point here. This route. Is that the route you mean?

Q. Yes, sir, the shortest one that you described.

A. Okay. Upper, Bolivar, okay. If you go from this point right here, Lime and Upper, you go up Upper Street, Bolivar and down Broadway, that distance is .63 miles.

Q. That's without counting any part of Scott Street?

A. Right.

Q. How long is Scott Street?

A. From Scott Street, that distance is .29 miles.

Q. So it's a little over nine tenths of a mile to make the whole circle; is that right?

A. It's about three tenths of a mile difference then distance wise. If you were here and you went about three tenths of a mile farther in going this route.

Q. I'm asking you the whole circle is a little over nine tenths of a mile.

A. Yes.

Q. How about the second alternate route you described; have you measured that?

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A. Yes.

Q. How long is that distance? You can just take a minute and add 'em together, if you would, rather than going through the whole thing, if you don't want to.

A. I've got so many here. I'm trying to pick out the ones—I'll just add 'em all. You want the complete circle from?

Q. From the front of their property to get into their property.

A. To Broadway, Virginia, Lime and Scott. It's about one and a half miles for that complete circle.

Q. You described, going back to the first route again, you described Bolivar as a warehouse district; is that right?

A. There's warehouses down Bolivar, yes.

Q. Until you get to the university buildings, Upper is a warehouse area.

A. Yes, sir, there's some warehouses on Upper.

Q. And after you pass the university, you're back to a warehouse area on Scott Street; isn't that right?

A. Right.

Q. Now, if you were coming south on South Broadway, away from town, and you passed Comer's and decided you wanted to go on and make this circle you've described, how many streets that are dead-end streets along South Broadway

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will you pass before you got to Virginia Avenue?

A. There's about three or four that is dead and always has been dead.

Q. So if you were a non-Lexingtonian and decided you wanted to take your chances to take left, left and left to get there, you'd first have to get out of three dead-end streets

before you got to Virginia, wouldn't you?

A. If it was me, sir, I would know where Comer's was and I'd know how to get there before I started.

Q. Yes. But if you didn't?

A. Then I'd just have to hunt it.

Mr. Miller: That's all. Thank you.

Mr. Kawaja: Your Honor, that's our case.

The Court: Parties want to be heard briefly? And since it's his burden, you go first.

Mr. Miller: I really don't have anything to add, Your Honor. To me, it's the same way it was before we started. The access is plainly unreasonable. We appreciate your time, Your Honor.

The Court: Anything you wish to say?

Mr. Kawaja: Only to say that we think it is reasonable, and since the case law supports this kind of situation, we would ask the Court to

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review the cases along with the testimony and make that application that this is reasonable access, which we have submitted a multitude of cases on, Your Honor. Thank you.

Ruling Of The Court:

The Court: Well, I happen to agree with your law, but the Court of Appeals does not. And since they are second and the last to speak, I have no alternative but to follow their ruling. They have directed I hold this hearing as to whether or not access to these two business establishments are reasonable.

I have heard evidence in that regard additionally. Courts are entitled to take judicial notice of those matters which are of common knowledge in the community. Having

been a resident of this community for a great number of years, being familiar with Mr. Comer and his establishment since at least 1962 in several regards, knowing the type of business he receives, where that business comes from, it will be the Court's conclusion that Mr. Comer's access has been diminished by at least sixty percent.

What's the name of the hotel?

Mr. Kawaja: Used to be the Scott Hotel.

The Court: The Scott Hotel has been reduced by about forty percent. Again, taking into play my judicial

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knowledge that the Scott Hotel at one time was principally for use by the people who worked for the railroad, whereas, Mr. Comer draws not only from the railroad people who used to work on the railroad but the entire community and substantial number of patrons from the University of Kentucky students.

So with that, it's the Court's determination that the access is not reasonable by virtue of the building of the underpass. Being a traveler of Broadway, I'm very happy to see the underpass being built because I don't have to worry about being killed now by trains.

I might add that one of the reasons I'm talking about these diminishing matters is I'm aware that Mr. Comer's business is not the same business it was fifteen years ago.

Hopefully, you fellows now can reach a conclusion. I have a rule in the Second Division that nothing bigger than what can be placed in a file folder cannot be—but you might, if you want to appeal this matter at some future date, substitute that for the record, but then if you go up on appeal to the Court of Appeals or Supreme Court, then you can take those up so they can see them better. They're not as familiar with this location as I am.

Mr. Kawaja: Your Honor, may I ask if the

Court would entertain making this an appealable matter at this point and then coming back for damages?

The Court: The Court's findings of fact and conclusions are as dictated into the record. I may look at 'em later and shudder at my grammar and English that I've used; but, nonetheless, that's going to be my findings of fact and conclusions. Let this be a final and appealable order. Maybe one of these days we'll get this case over with while Mr. Comer and I are still living.

THEREUPON, at 2:28 p.m., the hearing was concluded.

No. 87CI4114

FAYETTE CIRCUIT COURT

CIVIL BRANCH
SECOND DIVISION

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS - - - - - - *Appellant*

v.

RAYMOND COMER and
MARION CORN - - - - - - - - - - *Appellees*

TRANSCRIPT OF THE EVIDENCE AND PROCEEDINGS OF THE TRIAL HELD ON DECEMBER 17, 1990

Juanita Stallings
Official Court Reporter
401 Courthouse
Lexington, Kentucky 40507
(606) 233-0817

* * * * * * *

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The Court: Well, that's bad because it's the appellate court that directed me to have the trial.

Mr. Kawaja: I understand, Your Honor, but this is our position.

The Court: So if they want to reverse themselves. They're not reversing me. I've already ruled, but they reversed me.

Mr. Kawaja: We understand, Your Honor, but we feel like that's something that needs to go in the record.

At 9:15 a.m., the trial commenced in open court as follows:

The Court: Call the case of Raymond Comer and Marion Corn v. Commonwealth of Kentucky, Department of Transportation or Cabinet of Transportation. What says the plaintiffs?

Mr. Miller: We're ready, Your Honor.

The Court: And what says the Commonwealth?

Mr. Kawaja: We're ready, Your Honor.

The Court: Call around the jury.

* * * * * * *

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The Court: Overruled. As I've said throughout this litigation, I am in disagreement with the ruling of the appellate court, but twice I have attempted to resolve the matter and twice the appellate court sent it back. I was harking back to the days of Frisch's Restaurant on Harrodsburg Road when they four-laned the highway. There were two problems in that case. One, as to whether

or not the lessee was entitled to show the value of their lease separate and apart from the total value of the property, and, second, whether or not lace of access or limited access to a highway was compensable. And the appellate court, at that time the highest court, in both cases said lack of access or limited access is not compensable. Two, the property has to be valued as a whole. And I'm not aware of any case which has changed that law, but somewhere along the line maybe the appellate court is desirous of changing what our law might be and maybe they want a new start at it, so I'm attempting to give them a new start. I've never hesitated to let 'em know what I think about a matter, but that's their decision they have to make, not mine.

Mr. Miller: Let me state for the record that * * *

* * * * * * * *

No. 90-CA-000497

COURT OF APPEALS OF KENTUCKY

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS - - - - - - *Appellant*

v.

RAYMOND COMER and
MARION CORN - - - - - - - - - - *Appellees*

APPEAL FROM FAYETTE CIRCUIT COURT
SECOND DIVISION, CIVIL ACTION NO. 87-CI-4114
HON. N. MITCHELL MEADE, TRIAL JUDGE

BRIEF FOR APPELLANT COMMONWEALTH OF KENTUCKY TRANSPORTATION CABINET DEPARTMENT OF HIGHWAYS

This is to certify that the record on appeal was not withdrawn by the party filing this Brief and that copies of this Brief have been served pursuant to CR 76.12 upon the Trial Judge, Hon. N. Mitchell Meade, Fayette County Courthouse, Lexington, Kentucky 40507; and to Hon. Robert S. Miller and Hon. Thomas C. Marks, Miller, Griffin & Marks, 700 Security Trust Building, Lexington, Kentucky 40507, Attorneys for Appellees, on this the 27th day of July, 1990.

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS
/s/ LOUIS KAWAJA
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FILED —May 13, 1991

No. 91-CA-000137

COURT OF APPEALS OF KENTUCKY

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS - - - - - - *Appellant*

v.

RAYMOND COMER and
MARION CORN - - - - - - - - - - *Appellees*

APPEAL FROM FAYETTE CIRCUIT COURT
SECOND DIVISION, CIVIL ACTION NO. 87-CI-4114
HON. N. MITCHELL MEADE, TRIAL JUDGE

BRIEF FOR APPELLANT COMMONWEALTH OF KENTUCKY TRANSPORTATION CABINET DEPARTMENT OF HIGHWAYS

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COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS
/s/ LOUIS KAWAJA
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STATEMENT OF POINTS AND AUTHORITIES

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No. 88-CA-1345-MR

RENDERED: APRIL 20, 1989; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

RAYMOND COMER and
MARION CORN - - - - - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS - - - - - *Appellee*

Appeal From Fayette Circuit Court
Honorable N. Mitchell Meade, Judge
Civil Action No. 87-CI-4114

VACATING AND REMANDING

BEFORE: DYCHE, ELSWICK and LESTER, Judges.

LESTER, JUDGE. This is an appeal from an order in an inverse condemnation action dismissing the complaint.

Raymond Comer and Marion Corn owned certain properties fronting on South Broadway in Lexington upon which they operated a hotel, lounge, and restaurant. In 1987, the Department of Highways constructed a railroad underpass, the effect of which was to eliminate direct access to appellants' land from Broadway and cause that ingress

and egress to be lengthened by eight tenths of a mile over a route which, at least in part, utilized Scott Street. None of the appellants' tracts were taken for the project and their complaint centers around the circuitous access.

Subsequent to the filing of the complaint the appellee moved to dismiss and memoranda was ordered to be filed by both parties supporting their respective positions. No evidence was adduced but oral arguments were heard by the court at a regular motion hour after which the following order was entered:

> IT IS HEREBY ORDERED AND ADJUDGED as follows:
>
> 1. It appearing from the oral arguments that the parties are in agreement on certain factual matters that may be of assistance to any appellate court that may review this Order, the parties are directed to file a Stipulation of Facts;
>
> 2. Defendant's Motion to Dismiss is sustained.

The main thrust of this appeal centers around the reasonableness of the access to appellants' businesses or, to put it another way, is the additional eight tenths of a mile from Broadway such an unreasonable span as to warrant compensation. One of the most recent authorities upon the subject of unreasonableness of access following condemnation where none of the complainant's land was actually taken is *Commonwealth, Department of Highways* v. *Jent*, Ky., 525 S.W.2d 121 (1975), wherein the court pointed out:

> In *Commonwealth, Department of Highways* v. *Carlisle*, Ky., 363 S.W.2d 104, we held that the only access right that the landowner has is a right of reasonable access to the highway system. In *Commonwealth, Department of Highways* v. *Adkins*, Ky., 396 S.W.2d 768, we held that, conversely, the landowner cannot be deprived of reasonable access without just compensation.

> The question of reasonableness of access must be dealt with on a case-by-case basis. Ordinarily, whether the landowner has been deprived of reasonable access is a question of law which should be resolved by the court, but in order for it to be resolved at all it is indispensable that the facts be disclosed. *Adkins, supra.*

From the foregoing, we discern that it is the trial court's function to determine what is reasonable access and in order to do so evidence must be heard. In the case at bench, although it might be assumed that in dismissing the complaint the court viewed appellants' ingress and egress to be reasonable, it is axiomatic that the court speaks only through its orders, opinions or judgments and we have no specific finding on the prime issue of the litigation. Moreover, Raymond and Marion argue that they are entitled to present evidence and it is the mandate of *Jent* that they be allowed to do so.

The judgment is vacated and the cause remanded for proceedings consistent herewith.

ALL CONCUR.

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